

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN KENNEDY,

Defendant-Appellant.

UNPUBLISHED
September 4, 2003

No. 234899
Wayne Circuit Court
LC No. 00-012319

Before: Jansen, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years' incarceration. We affirm defendant's conviction, but vacate his sentence and remand for resentencing.

This case arises from an incident that occurred on September 27, 2000. On that day, defendant repeatedly visited the apartment residence where defendant's fiancée's sister resided. Previously, defendant and his fiancée had had a disagreement and defendant believed that his fiancée had then taken their daughter and gone to her sister's residence. On defendant's second trip to the residence that day, defendant and the victim engaged in a verbal altercation after the victim told defendant that defendant's fiancée was, in fact, not there. Defendant eventually left, but later returned. According to the victim, he again asked defendant to leave, but defendant insisted that his fiancée was inside, made a threatening statement, and then attacked the victim with a knife. Defendant does not dispute that he was at his fiancée's sister's residence that evening; however, he maintains that the victim instigated the altercation and that he stabbed the victim in self-defense.

Defendant first argues on appeal that he was denied a fair trial because the trial court repeatedly interrupted various witnesses' examinations and questioned those witnesses. We disagree.

MRE 614(b) permits a trial court to ask questions of witnesses. "While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), citing *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787

(1992). The test is whether the trial court's questions "may have unjustifiably aroused suspicion in the mind of the jury concerning the witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *Cheeks, supra*, citing *Conyers, supra* at 405.

In *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996), this Court recognized some situations where a trial court may have good reason to interject itself into the trial and question witnesses "in order to enhance the role of the criminal trial as a search for substantive truth." Those situations include:

(1) when the trial is lengthy and complex, (2) when attorneys are unprepared or obstreperous, or if the facts become confused and neither side is able to resolve the confusion and (3) when a witness is difficult or is not credible and the attorney fails to adequately probe the witness or if a witness becomes confused. [*United States v Dandy*, 998 F2d 1344, 1354 (CA6, 1993).] In addition, we note that there might be situations in which attorneys for both sides avoid asking a witness a material question on the (traditional in some quarters) ground that counsel never asks a question without first knowing the answer. [*Davis, supra* at 49-50.]

However, the court's discretion is not limitless. *Davis, supra* at 50; *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette, supra*. In reviewing an allegation of judicial partiality, this Court should look at the record as a whole, and not take portions of the record out of context. *Id.* A court should pose questions in a neutral manner, and any comments made should neither add to nor distort the evidence. *Davis, supra*. Moreover, "[a] trial court may not assume the prosecutor's role with advantages unavailable to the prosecution." *Id.* at 51, quoting *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). "When questions cross the line of judicial impartiality, this Court applies the harmless-error test." *Davis, supra*, citing *Weathersby, supra* at 110.

In the present case, defendant takes issue with the trial court's questioning of six witnesses, including the victim, the trauma surgeon that treated the victim, and defendant. We first address defendant's challenge concerning the trial court's examination of the victim and the trauma surgeon regarding the victim's injuries, the topic of which concerned the extent of the victim's wounds and the instrument used to inflict the wounds.

After the victim testified that defendant had a long knife in his hand, the trial court asked the victim questions about the dimensions of the knife. Later, when the victim testified that he got "caught [by the knife] right here in the back of my neck by the spine," the trial court asked defendant to explain what that meant, and the victim clarified that he got "stabbed by the knife in the back of my neck by my spine." Thereafter, the trial court instructed the victim to "[s]how us, show the jury," i.e., to show his scar to the jury. During the prosecution's examination of the trauma surgeon, the trial court asked the surgeon about the depth of the victim's wound to the abdomen. The surgeon testified that she was able to insert her index finger into the wound, and she estimated the depth at "[s]ix, seven inches at least."

Defendant challenges the trial court's questioning and conduct as prejudicial and biased in the prosecution's favor and asserts that "[t]he trial court aligned itself with the prosecution, and even assumed the role of the prosecutor in its questioning." However, defendant fails to show how the trial court's inquiry about the size of the knife and the extent of the victim's wounds denied him a fair trial. The trial court's questions sought clarity from the witnesses concerning the extent of the victim's wounds and from the victim whose choice of words did not necessarily paint a clear picture of what he was describing. The questions were asked in a neutral manner and were not designed to incriminate defendant. Further, simply because a trial court elicits testimony that damages a defendant's case does not, by itself, demonstrate that "the Court has improperly assumed the role of surrogate prosecutor." *Davis, supra*, citing *Dandy, supra*. We find no error.

Next, we address defendant's challenge concerning the trial court's examination of defendant. Defendant claims that the trial court's questioning "was intimidating and argumentative, harming [defendant's] credibility before the jury, and thus denying him the constitutional right to a fair and impartial trial."

Essentially, the trial court asked several questions during direct examination of defendant that appear to have been designed to elicit from defendant an explanation regarding why he returned to the residence on the night in question. To some extent, the trial court's questions allowed defendant to clarify his version of the events. However, the timing and extent of the trial court's examination is somewhat troubling and arguably called into doubt defendant's credibility. Although perhaps unwise, we cannot say, having reviewed the record as a whole, that the trial court's conduct deprived defendant of a fair trial. Even if the trial court's questions had crossed the line of judicial impartiality by invading the province of the prosecutor, in light of the totality of evidence introduced at trial any error was harmless. *Davis, supra*.

We have reviewed the remainder of defendant's arguments concerning the trial court's conduct and questioning of three other witnesses and we do not believe that the record as a whole shows bias on the part of the trial court, or that those arguments merit further discussion.

Defendant also argues that he is entitled to resentencing because the trial court had no substantial and compelling reason for its departure from the sentencing guidelines. Specifically, defendant claims that the trial court improperly based its departure on predatory conduct because that was already considered by the guidelines, MCL 777.40, and because predatory conduct is not an objective and verifiable factor. Defendant further claims that even if departure from the sentencing guidelines range was warranted, the extent of the departure constitutes an abuse of discretion.

In this case, the trial court imposed an upward departure from the guideline range because defendant engaged in threatening and intimidating conduct that the trial court characterized as being predatory. These events included several visits by defendant to the incident location before the actual assault on the victim occurred. These visits included defendant conducting himself in an intimidating manner toward persons other than the victim. Further, the trial court relied on defendant's conduct after the incident that involved engaging in intimidating and threatening behavior toward the victim, his fiancée and her family, including general threats directed on the lives of those who "stood in his way."

The legislative sentencing guidelines apply in this case because the incident occurred after January 1, 1999. MCR 6.425(D)(1); MCL 769.34(1) and (2), *People v Babcock (Babcock I)*, 244 Mich App 64, 72; 624 NW2d 479 (2000), after rem (*Babcock II*), 250 Mich App 463; 648 NW2d 221 (2002), rev'd *People v Babcock (Babcock)*, __ Mich __; 666 NW2d 231 (2003) [Docket No. 121310, rel'd July 31, 2003]. Generally, the minimum sentence imposed must be within the sentencing guidelines range. MCL 769.34(2). However, a court may depart from the sentencing guidelines range if it “has a substantial and compelling reason for that departure and states on the record the reasons for departure.” MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001).¹ Concerning the phrase “substantial and compelling reason,” the *Babcock* Court explained that

[t]he phrase “substantial and compelling reason” has, in our judgment, acquired a peculiar and appropriate meaning in the law and, thus, it must be construed according to such meaning. That is, a “substantial and compelling reason” must be construed to mean an “objective and verifiable” reason that “‘keenly’ or ‘irresistibly’ grabs our attention”; is “of ‘considerable worth’ in deciding the length of a sentence”; and “exists only in exceptional cases.” [*Id.* at slip op pp 9-10, citing *People v Fields*, 448 Mich 58, 62, 67-68; 528 NW2d 176 (1995).]

We first address defendant’s argument that the trial court improperly based its departure on predatory conduct. To the extent that resolution of this issue requires this Court to properly apply statutory sentencing provisions, our review is de novo. *Hegwood, supra* at 436. In reviewing a departure from the guidelines range, the existence or nonexistence of a particular factor is a factual determination subject to review for clear error and the determination that the factor is objective and verifiable is reviewed as a matter of law. *Babcock, supra* at slip op p 18, citing *Babcock I, supra* at 75-76.

Defendant claims that predatory conduct already has been taken into account under offense variable (OV) 10. We disagree. Defendant is correct in asserting that a court may not base a departure from the sentencing guidelines on characteristics already accounted for in the guidelines unless the characteristics have been given inadequate or disproportionate weight. MCL 769.34(3)(b). However, contrary to defendant’s argument, OV 10 does not address the conduct at issue here. MCL 777.40(1) provides that OV 10 is to measure the exploitation of a vulnerable victim. Fifteen points are to be scored for this variable if predatory conduct, defined as “preoffense conduct directed at a victim for the primary purpose of victimization” (emphasis added), is involved. MCL 777.40(1)(a) and (3)(a). Because the statute expressly limits consideration of facts necessary to support OV 10 to preoffense conduct directed at the victim, it necessarily excludes postoffense conduct directed at the victim, as well as all conduct directed elsewhere. It was exactly this conduct that is not addressed in OV 10 that the trial court relied on when departing from the sentencing guidelines range. Thus, the trial court did not base the departure on factors already considered by the guidelines.

¹ The *Hegwood* Court explained that “[i]n MCL 769.34(3), the Legislature states a rule that makes no apparent distinctions between ‘upward departures’ that increase the sentence beyond the length stated in the guidelines and ‘downward departures’ that decrease the sentence below the length stated in the guidelines.” *Hegwood, supra* at 440 n 16.

Further, we disagree with defendant's assertion that the existence of predatory conduct is not an objective and verifiable factor. The trial court departed from the guidelines on the ground that predatory conduct existed, in the form of defendant's repeated visits to the residence where the incident occurred, as well as contact with his fiancée's family before and after the stabbing. To the extent that defendant asserts that the determination of whether predatory conduct requires the court to believe one witness over another, it is inherently subjective, and therefore an improper basis for a departure, we disagree. Evidence at trial indicated that defendant contacted and sometimes threatened the victim's fiancée and her family numerous times, both before and after the stabbing incident that led to defendant's conviction of assault with intent to do great bodily harm less than murder. Predatory conduct such as this is both objective and verifiable. Further, predatory conduct toward others besides the victim is not considered in the sentencing guidelines, is a nondiscriminatory reason, and is thus a proper basis for departure. See MCL 769.34(3)(a) and (b). Therefore, we conclude that the trial court did have a substantial and compelling reason for its departure from the sentencing guidelines.

We turn now to the question whether the trial court's substantial and compelling reason justified the departure imposed. We review whether a departure is justified for an abuse of discretion. *Babcock, supra* at slip op pp 18, 23; *Babcock I, supra* at 75-76. With regard to what constitutes abuse of discretion in this context, our Supreme Court recently explained that

[a]t its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [*Babcock, supra* at slip op p 23 (citations omitted).]

The *Babcock* Court also stated that “[i]n determining whether a sufficient basis exists to justify a departure, the principle of proportionality—that is, whether the sentence is proportionate to the seriousness of the defendant's conduct and to the defendant in light of his criminal record—defines the standard against which the allegedly substantial and compelling reasons in support of departure are to be assessed.” *Babcock, supra* at slip op p 14-15. The Court clarified:

In other words, while “substantial and compelling” sets forth the quality of the reasons that must be set forth in support of a departure from the guidelines, the principle of “proportionality” defines the standard against which the decision to depart, and the particular departure imposed, must be assessed. [*Babcock, supra* at slip op p 15 n 20.]

Here, although the trial court stated an appropriate substantial and compelling reason for its departure from the sentencing guidelines range and stated on the record its reasons for departure, MCL 769.34(3), we find that defendant's sentence is not proportionate and therefore constitutes an abuse of the trial court's discretion. See *Babcock, supra*. The sentencing guidelines range was 19 to 76 months, but the trial court departed from the sentencing guidelines on the basis of defendant's predatory conduct, which was not accounted for in the sentencing guidelines, and sentenced defendant to 20 to 40 years' imprisonment. We do not dispute that the

predatory conduct at issue magnified the consequences of defendant's crime by causing measurable fear and uncertainty to individuals associated with the victim. What we do not agree with is that these consequences place a sentence that is more than triple the otherwise presumptively proportionate sentence of the legislative guidelines within the range of principled outcomes. Defendant's conduct simply does not warrant such a dramatic upward departure. Thus, although we agree that an upward departure is indicated, we conclude that the extensive departure from the sentencing guidelines range imposed here is not proportionate to the seriousness of defendant's predatory conduct and therefore is an abuse of discretion. Consequently, resentencing is necessary.

Defendant's conviction is affirmed, but his sentence is vacated and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage